No. 15,698

United States Court of Appeals

For the Ninth Circuit

ARMIDA ALDRIDGE,

Appellant,

vs.

STATES MARINE CORPORATION OF DELAWARE, a Corporation,

Appellee.

APPELLEE'S BRIEF.

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STATEMENT OF JURISDICTION.

The District Court's jurisdiction in this action was based upon the amount in controversy and diversity of citizenship of the parties as disclosed by the verified petition for removal (R. 3-5) from the Superior Court of San Francisco. 28 U.S.C. 1332. This Court's jurisdiction on appeal is based on 28 U.S.C. 1291, 1294 (1).

APPELLEE'S STATEMENT OF THE CASE.

This is an appeal from District Judge Edward P. Murphy's order (R. 33-34) dismissing appellant's first amended complaint for failure to state a claim upon which relief can be granted, and from his order (R. 35-36)

denying appellant's motion to set aside the order of dismissal and permit the filing of a second amended complaint.

Appellant brought her action below to recover damages for the death of a longshoreman who was killed when a load of heavy wooden dunnage fell upon him. Appellant does not allege that the accident was caused by any defect in the gear or equipment of appellee's vessel or by any negligence in the operation of such gear by the vessel's crew. There is no dispute as to the manner in which the decedent was killed. He and other members of his longshore gang, all employees of the Schirmer Stevedoring Company, an independent contractor, undertook while on board the appellee's vessel to break the metal bands around a load of dunnage by placing a cargo hook in the bands and raising the load into the air. The dunnage weighed between one and two tons, and it was expected that the bands would break under the weight of the load, causing the dunnage to fall on the deck where appellant's decedent was standing.

Appellant concedes the immediate cause of the accident but contends that appellee was negligent in failing to prevent it by providing band cutters or other means for the longshoremen to break the bands. Appellant has filed two separate complaints (R. 6-12; R. 17-22) which describe in great detail the circumstances connected with the accident. The facts are thus before this Court and the only issue concerns the inferences to be drawn from them.

SUMMARY OF ARGUMENT.

The motion to dismiss appellant's first amended complaint was properly granted. Although the averments of the pleading must be viewed in a light most favorable to the appellant, they clearly disclose the impossibility of stating and proving a claim upon which relief can be granted.

The first amended complaint is fatally defective because it clearly shows that appellant's decedent was negligent as a matter of law. This action, unknown to the general maritime law, is brought under the California death statute. It is governed not by the comparative negligence doctrine of the maritime law, but by the contributory negligence rule of California which operates to bar appellant's recovery even assuming actionable negligence on the part of the shipowner.

The first amended complaint is also defective because it affirmatively appears from the facts alleged that the decedent's death was not proximately caused by any negligent act or omission of the appellee shipowner. The duty, if it existed, to provide means with which to break the metal strapping was contractual in nature and its breach cannot afford the basis for this tort action. Appellant seeks to impose upon the shipowner a duty to oversee, supervise and control the manner in which the employees of an independent stevedoring contractor perform their work. The law neither recognizes nor exacts any such duty.

Appellant relies upon several Federal Employers' Liability Act and Jones Act cases which were heard by the

United States Supreme Court in its 1956 Term. These were statutory negligence actions involving special features drafted in the master-servant context. Appellant's reliance upon these cases is wholly unfounded in the third party situation present here. The appellee had no control over the manner in which the longshoremen performed their work and is not responsible for the dangerous method chosen by them to break the dunnage bands.

The court below did not abuse its discretion in dismissing appellant's first amended complaint without leave to amend. The difficulty which confronts the appellant is not her failure to allege enough facts, but is instead the nature of these facts as disclosed by the detailed allegations of both complaints. Appellant has not submitted a copy of the proposed new amendment, nor has she suggested to the court below or to this Court any new facts which would support her claim. Appellant seeks to enlarge the theory presented by her pleading, but in so doing she still cannot overcome its basic defects.

ARGUMENT.

I.

THE ASSERTED CONDUCT OF APPELLANT'S DECEDENT CONSTITUTED NEGLIGENCE AS A MATTER OF LAW, AND BARS HER FROM RECOVERY IN THIS ACTION.

In the absence of statute, no recovery for wrongful death is recognized as a part of the general maritime law.

Western Fuel Co. v. Garcia (1921) 257 U.S. 233;
The Harrisburg (1886) 119 U.S. 199.

There is no maritime death statute available to support this action. Appellant's claim is instead brought under the provisions of Section 377 of the California Code of Civil Procedure, which permits the heirs or personal representatives of a decedent to maintain an action for damages for death caused by the "wrongful act or neglect" of another.

In *Western Fuel Co. v. Garcia,* supra, the Supreme Court held that the one-year statute of limitations applicable in this state must govern in an admiralty action brought under the California death act. The admiralty rule of laches was held not to apply because the limitation provision was an integral part of the statutory right of action there sought to be enforced. This same reasoning has established by the overwhelming weight of authority the practice of determining the effect of contributory negligence by the law of the state under whose death statute the claim is brought.

Curtis v. A. Garcia Y Cia. (3 Cir. 1957) 241 F. 2d 30;

Graham v. A. Lusi, Limited (5 Cir. 1953) 206 F. 2d 223;

Klingseisen v. Costanzo Transp. Co. (3 Cir. 1939) 101 F. 2d 902;

Feige v. Hurley (6 Cir. 1937) 89 F. 2d 575;

Robinson v. Detroit & C. Steam Nav. Co. (6 Cir. 1896) 73 Fed. 883;

Hartford Accident & Indemnity Co. v. Gulf Refining Co. (E. D. La. 1954) 127 F. Supp. 469;

The A. W. Thompson (S. D. N.Y. 1889) 39 Fed. 115;

See *The H. S., Inc., No. 72* (3 Cir. 1942) 130 F. 2d 341, 343;

Quinette v. Bisso (5 Cir. 1905) 136 Fed. 825, 838;

The City of Norwalk (S. D. N. Y. 1893) 55 Fed. 98, 112.

We recognize that the Court of Appeals for the First Circuit has indicated an intention to depart from the established rule. See *O'Leary v. United States Line Company* (1 Cir. 1954) 215 F. 2d 708, 711.[1] Even there, however, the court did not reach a contrary holding.

> "In this case, however, we do not, and indeed we cannot except by dictum, pass upon the question of the law applicable to count one. The reason for this is that we do not see how on the evidence a finding of the defendant's causal negligence could reasonably be made under either local or maritime law. Wherefore we do not reach the question of contributory negligence wherein local and maritime law differ radically in that under the former such negligence provides a complete defense whereas under the latter it serves only to mitigate damages." (215 F. 2d 708, 712).

The basis of the well settled and correct rule is that the cause of action for wrongful death, unknown to the general maritime law, must be enforced as it exists within

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[1]The contrary discussion in the *O'Leary* case is a logical extension of the solitary position taken by that Court on the matter of a federal court's jurisdiction to entertain maritime actions on its law side in the absence of diversity of citizenship. Compare *Doucette v. Vincent* (1 Cir. 1952) 194 F. 2d 834, with *Jordine v. Walling* (3 Cir. 1950) 185 F. 2d 662; *Paduano v. Yamashita Kisen Kabushiki Kaisha* (2 Cir. 1955) 221 F. 2d 615; *Modin v. Matson Nav. Co.* (9 Cir. 1942) 128 F. 2d 194.

the state creating it.[2] This principle was well expressed in *Graham v. A. Lusi, Limited* (5 Cir. 1953) 206 F. 2d 223, 225:

> "We are in no doubt that appellant's right of action under [the Florida Wrongful Death Statute], like other rights of action arising in admiralty under Lord Campbell's act and similar acts, is to be enforced according to the principles of the common law, and contributory negligence and the exercise of due care are absolute defenses thereunder. Without this statute, the appellant could not maintain her libel because the prior maritime law conferred no right upon the personal representatives of a deceased maritime employee to recover indemnity for his death. Cf. Lindgren v. United States, 281 U.S. 38, 47, 50 S. Ct. 207, 211, 74 L. Ed. 686. The statute must be applied in admiralty just as if the suit had been brought in the state courts, and any defenses which are open to the appellee under the jurisdiction of the state, if successfully maintained, will bar recovery under the libel."

This rule has likewise been recognized by implication within this Circuit, where it has been held that the California death statute does not create a cause of action for unseaworthiness.

> *Mortenson v. Pacific Far East Line* (N.D. Cal. 1956) 148 F. Supp. 71.

It is settled law in California that the contributory negligence of a decedent bars any recovery by his heirs

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[2]"[A]dmiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State." Mr. Justice Black in *Garrett v. Moore-McCormack Co.* (1942) 317 U.S. 239, 245.

under this statute. Such negligence provides a complete defense and does not serve only to mitigate damages.

Buckley v. Chadwick (1955) 45 Cal. 2d 183, 288 P. 2d 12;

See *Carroll v. Beavers* (1954) 126 Cal. App. 2d 828, 273 P. 2d 56, 59;

Chinnis v. Pomona Pump Co. (1940) 36 Cal. App. 2d 633, 98 P. 2d 560, 565.

It is also recognized in California that contributory negligence can exist as a matter of law.

Powers v. Raymond (1925) 197 Cal. 126, 239 Pac. 1069.

That appellant's decedent was guilty of such negligence is apparent from the facts alleged in the amended complaint. He was 52 years old and had been employed as a longshoreman for approximately 30 years (R. 21). It is also clear from the amended complaint that the decedent voluntarily participated in the method selected by the longshoremen for breaking the straps (R. 19-20). He therefore was or should have been aware of the dangers inherent in standing beneath a load of dunnage weighing between one and two tons, raised by means of straps which he and the other longshoremen knew—actually intended—would break.[3] The death of appellant's decedent was caused by a foolish and reckless act which he chose to do in plain disregard of his own safety. The conclusion

[3]Appellant's decedent was thus like a willing Damocles, the flatterer whom Dionysius of Syracuse rebuked for his constant praises of the happiness of kings by seating him at a royal banquet beneath a sword hung by a single hair.

that he was negligent is thus inescapable under the facts alleged.

Regardless of the validity of any claim appellant might otherwise be able to state against the appellee, she is barred from recovery in this action because her decedent was negligent as a matter of law.

See *Grenawalt v. South African Marine Corporation* (S.D. N.Y. 1955) 130 F. Supp. 432, 434.

Although this ground of defense was not specifically argued in the court below, it was clearly encompassed by appellee's motion to dismiss the amended complaint for failure to state a claim upon which relief can be granted (R. 22-23). The order dismissing the amended complaint is supportable on this ground and accordingly should be affirmed.

II.

IT IS APPARENT ON THE AMENDED COMPLAINT THAT APPELLEE'S FAILURE TO FURNISH MEANS FOR BREAKING THE DUNNAGE STRAPS WAS NOT THE PROXIMATE CAUSE OF THE DECEDENT'S DEATH.

In the court below appellee based its defense in part upon the argument that the shipowner, as a matter of law, had no duty to provide band cutters or some other means to break the metal bands strapped around the load of dunnage (R. 23-24). Considerable support for this proposition is found in those cases imposing no liability upon a vessel or her owners for the failure to provide implements which by their very nature are not part of the ship's equipment, tackle and machinery, but are instead peculiar

to the loading and unloading work of which the stevedores are in control. See, for example:

Signore v. S.S. Ferngulf (S.D.N.Y. 1952) 103 F. Supp. 677;

Riley, Admx. v. Agwilines (1947) 296 N.Y. 402, 1947 A.M.C. 1038.

It is equally true that a vessel's voluntary offer of some of her facilities cannot be converted into a duty to furnish this type of equipment in lieu of the stevedore's obligation to do so.

See *O'Connell v. Naess* (2 Cir. 1949) 176 F. 2d 138, 140.

We do not concede that this argument has no application on an appeal from an order granting a motion to dismiss. This is particularly true where the pleading shows that the decedent was employed by an independent stevedoring contractor and that the method employed for breaking the straps was part of the business and within the control of the stevedore. For the purposes of this appeal, however, and in light of the wording[4] of Judge Murphy's order granting the motion, this argument will not be formally presented.

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[4]"Assuming arguendo that the shipowner had a duty to the stevedores to furnish means with which to break the strapping, it affirmatively appears from the facts alleged in the complaint that the breach of this duty was not the proximate cause of decedent's death." (R. 33-34)

A. The Recent Pronouncements by the Supreme Court in Federal Employers' Liability Act and Jones Act Cases Are Not Applicable to the Case at Bar.

Counsel for the appellant place great reliance upon a series of cases heard in the October, 1956 Term of the United States Supreme Court wherein the elements of *employer* negligence were considered under the principles of the Federal Employers' Liability Act.[5]

Rogers v. Missouri P.R. Co. (1957) 352 U.S. 500, 524, 529;

Webb v. Illinois C.R. Co. (1957) 352 U.S. 512, 521;

Herdman v. Pennsylvania R. Co. (1957) 352 U.S. 518, 521;

Ferguson v. Moore-McCormack Lines (1957) 352 U.S. 521, 524;

Arnold v. Panhandle & S.F.R. Co. (1957) 353 U.S. 360;

Ringhiser v. Chesapeake & O.R. Co. (1957) 354 U.S. 901.

With the exception of *Ferguson v. Moore-McCormack Lines,* supra, a Jones Act[6] case involving the same statutory provisions, each was an F.E.L.A. suit brought by a railroad employee. The gist of the Supreme Court's rulings is found in the language of Mr. Justice Brennan's opinion in the *Rogers* case (352 U.S. 500, 505):

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the

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[5]35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1952).

[6]37 Stat. 1185 (1915), as amended, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952).

slightest, in producing the injury or death for which damages are sought."

Mr. Justice Brennan further points out that the Court is concerned only with "the special features of this statutory negligence action" which involve a "far more drastic duty" of the master to his servant than that existing in the ordinary common-law negligence action. The "significantly different" aspects of these F.E.L.A. and Jones Act cases clearly negate their application in any situation not precisely governed by the same statutory provisions.

But there is a more compelling reason for distinguishing the result of these cases. Even in applying the "in whole or in part"[7] doctrine of employer negligence in the F.E.L.A. setting the Supreme Court did not depart from the fundamental concept that a basis for a finding of liability must exist before a jury case is presented. Indeed, such was the actual holding in *Herdman v. Pennsylvania R. Co.* (1957) 352 U.S. 518, 521, where the court affirmed a judgment entered on a directed verdict in favor of the employer.

The remaining decisions must then be viewed with reference to the nature of the accident and the degree to which it relates to the employer's supervision and control as presupposed by the statute. The holding in *Ferguson v. Moore-McCormack Lines* (1957) 352 U.S. 521, 524, that a jury question was presented on the issue of

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[7]". . . [E]very common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury . . . or . . . death . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . ." 45 U.S.C. § 51.

the employer's negligence in failing to provide the plaintiff with a proper tool for chipping hard ice cream is thus readily explainable. The plaintiff was under instructions from his employer to give prompt service in filling ice cream orders. His employer was in direct control of the manner in which this was to be done. Commensurate with the employee's duty to obey was the employer's obligation to furnish him safe tools for his job. Given this relationship, it was then clearly a question of fact whether it was foreseeable that Ferguson would use the butcher knife at hand in obeying his employer's order to give prompt service.

At best these cases are restricted in their application only to those situations governed expressly by the standards embodied in the Federal Employers' Liability Act. Even in this limited area, however, there has already been some obvious confusion as to the meaning of the Supreme Court's recent rulings. This is aptly illustrated by two cases arising in the Court of Appeals for the Seventh Circuit. In *Gibson v. Elgin, Joliet & Eastern Railway Company* (7 Cir. 1957) 246 F. 2d 834, the court held that although a finding essential to support a verdict in favor of the plaintiff in an F.E.L.A. case was "based upon one inference which rests in turn upon another inference," it was constrained under the decision in *Rogers v. Missouri P.R. Co.* (1957) 352 U.S. 500, 524, 559, to permit speculation, conjecture and possibilities to support a jury verdict. Three months later, however, the same court in *Milom v. New York Central Railroad Company* (7 Cir. 1957) 248 F. 2d 52 took the opposite view and reversed a judgment entered on a jury verdict for

the plaintiff in another F.E.L.A. case on the ground that it could *not* speculate as to the cause of the injury. The misgivings felt as a result of the Supreme Court's rulings are expressed in Chief Judge Duffy's concurring opinion (248 F. 2d 52, 57):

> "In view of these recent decisions, I have great difficulty in visualizing a situation where an inference could not be made from some kind of circumstantial evidence, which would be said to support a verdict for the plaintiff. If I were completely convinced, it would be my duty to dissent in the case at bar, *Gibson v. E.J. & E. Ry. Co.*, 7 Cir., 246 F. 2d 834 opinion on rehearing. However, I shall await with great interest further pronouncements by the Supreme Court."

Whatever might be the true meaning of these decisions we can only wait with Judge Duffy to learn. It is clear, however, that they do not apply in this case.

B. Appellee Had No Duty to Supervise the Work of Appellant's Decedent or Control the Manner in Which It Was Performed.

The original complaint in this action contained an allegation that the appellee owed a duty to oversee and supervise the work of the deceased longshoreman (R. 7). Although this express allegation was deleted from the amended complaint, its spirit still lingers. Appellant must necessarily found her claim upon some affirmative duty of supervision, even though she has impliedly conceded that no such duty exists. The action is not based upon any allegations of "operating" negligence or defects in the vessel's condition chargeable to the shipowner. Appellant instead seeks to impose upon the appellee a duty to prevent the longshoremen from selecting and con-

tinuing to use an unsafe method of work. The cases do not go this far. They clearly relieve the shipowner from any obligation to exercise with respect to independent harbor workers the kind of supervisory responsibility or "nursing care" necessary to prevent them from disregarding the plain measures to be taken for their own safety.

Manera v. United States (E.D.N.Y. 1954) 124 F. Supp. 226;

Berti v. Compagnie De Navigation Cyprien Fabre (2 Cir. 1954) 213 F. 2d 397;

See *Grenawalt v. South African Marine Corporation* (S.D.N.Y. 1955) 130 F. Supp. 432, 434;

Lynch v. United States (2 Cir. 1947) 163 F. 2d 97, 98.

In *O'Leary v. United States Line Company* (1 Cir. 1954) 215 F. 2d 708, the court had occasion in an action for the death of a longshoreman brought under the Massachusetts version of Lord Campbell's Act to consider the question of the shipowner's duty under facts analogous to those here presented.

> "No claim is made that the vessel involved was unseaworthy in any respect. Both counts sound in negligence generally, that is, without specification of any precise fault, so we must look to see whether there is any evidence from which a jury might reasonably find that the defendant shipowner was negligent in the performance of any duty of care it owed to the decedent as an employee of an independent contractor.
>
> "* * *[A]ny finding of the defendant's negligence must be predicated on a duty to light. * * * Lighting

the hold was an incident of the stevedoring operation over which the shipowner retained no control, and if there was any breach of the duty to light, the breach was that of the master stevedore, not that of the shipowner. * * * Under these circumstances the plaintiff must be content with her remedies under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 901-950, without what Mr. Justice Jackson dissenting in Pope & Talbot, Inc. v. Hawn, supra, 346 U.S. at page 419, 74 S. Ct. at page 210 referred to as 'a bonus recovery over and above the statutory scale of compensation that Congress has established for injured harbor workers in general.' '' (215 F. 2d 708, 712, 713).

C. If Appellee Had a Duty to Provide Means With Which to Break the Dunnage Straps, That Duty Was Contractual in Nature and Its Breach Would Not Give Rise to a Tort Action.

In the absence of a duty actually to supervise and control the manner in which the longshoremen performed their work or to prevent them from performing it in an unsafe manner, the shipowner's failure to provide band cutters can give rise to no claim in this action. This is so even though appellee may have had a ''duty'' to provide them. There is no relation existing between the parties which calls for any stronger duty than that which may be said to exist by contract. This is not a master-servant situation; the shipowner and the employees of an independent stevedoring contractor are strangers to any relation other than that of business invitor and invitee. The requirements of that relationship were fully satisfied by appellee. There is no question in this case as to the condition of the vessel or her equipment, or that there were dangers involved which were known to

the owner and not to the "guest."[8] And there is really no issue as to whether there was, as appellant contends, an agreement by the shipowner to provide in effect a tool for the use of the longshoremen or whether this was the responsibility of the stevedore. Even if the appellee had this duty and failed to fulfill it no tort cause of action has been stated.

Moch v. Rensselaer Water Co. (1928) 247 N.Y. 160, 159 N.E. 896.

Mr. Justice Cardozo's opinion in the *Moch* case is one of his landmarks. It was written for a unanimous court when he was Chief Judge of the New York Court of Appeals. On a motion to dismiss in the nature of a demurrer, the court denied recovery against a water-works company which, after notice of the existence of a fire, failed to supply to the street main the pressure which it had contracted with the city to supply. The plaintiff's building had been destroyed. The court found no basis for a tort action even though it were assumed that the defendant had been *negligent* in failing to maintain the water pressure. Cardozo's language still stands as a classic of judicial eloquence (159 N.E. 896, 898, 899):

> "The hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all. A time-honored formula often phrases the distinction as one between misfeasance and nonfeasance. Incomplete the formula is, and so at times misleading. Given a relation involving in its existence a duty of care irrespective

[8]Cf. *Puleo v. H. E. Moss & Co.* (2 Cir. 1947) 159 F. 2d 842, 845, cert. denied, 331 U.S. 847.

of a contract, a tort may result as well from the acts of omission as of commission in the fulfillment of the duty thus recognized by law. * * * What we need to know is not so much the conduct to be avoided when the relation and its attendant duty are established as existing. What we need to know is the conduct that engenders the relation. It is here that the formula, however incomplete, has its value and significance. If conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward. * * * The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm or has stopped where inaction is at most a refusal to become an instrument for good. * * *

"The plaintiff would have us hold that the defendant, when once it entered upon the performance of its contract with the city, was brought into such a relation with everyone who might potentially be benefited through the supply of water at the hydrants as to give to negligent performance, without reasonable notice of a refusal to continue, the quality of a tort. * * * We are satisfied that liability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty. * * * The assumption of one relation will mean the involuntary assumption of a series of new relations, inescapably hooked together. Again we may say in the words of the Supreme Court of the United States 'The law does not spread its protection so far.' * * * What we are dealing with at this time is a mere negligent omission unaccompanied by malice or any aggravating elements. The failure in such circumstances to fur-

nish an adequate supply of water is at most the denial of a benefit. It is not the commission of a wrong."

The principle applied in the "waterworks" case is clearly supported by the weight of authority in this country. See Prosser on Torts (1941 Ed.) p. 208; Seavey, Mr. Justice Cardozo and the Law of Torts (1939) 52 Harv. L. Rev. 372, 391. It has been applied to deny tort liability in numerous other factual situations analogous to the one here presented, all of which have involved the defendant's failure to perform as agreed. See, for example:

Randolph's Adm'r. v. Snyder (1910) 139 Ky. 159, 129 S.W. 562 (failure to attend as a physician);

Newton v. Brook (1902) 134 Ala. 269, 32 So. 722 (failure to prepare property for shipment by certain train);

Stone v. Johnson (1938) 89 N.H. 329, 197 Atl. 713, aff'd. (1939) 90 N.H. 311, 8 A. 2d 743 (failure to furnish light for nurse's room);

Dawson Cotton Oil Co. v. Kenan, McKay & Speir (1918) 21 Ga. App. 688, 94 S.E. 1037 (failure to deliver goods ordered).

We submit that these cases are controlling here.

D. Appellee's Defenses Affirmatively Appear From the Facts Alleged in the Amended Complaint and Can Properly Be Raised by Motion to Dismiss.

It is apparent from the amended complaint that the decedent's death was caused solely by an improper and careless use of the ship's gear by the longshoremen in

the performance of their work. This Court has repeatedly held that the shipowner is not liable for such misuse of a vessel's equipment.

Freitas v. Pacific-Atlantic Steamship Company (9 Cir. 1955) 218 F. 2d 562;

Vileski v. Pacific-Atlantic S.S. Co. (9 Cir. 1947) 163 F. 2d 553;

The Daisy (9 Cir. 1922) 282 Fed. 261.

It is also obvious from the amended complaint that plaintiff's decedent voluntarily participated in this unsafe work method and that he did so in reckless disregard of his own safety. For this there can be no recovery.

Jackson v. Pittsburgh S.S. Co. (6 Cir. 1942) 131 F. 2d 668.

The *Jackson* case is a compelling authority in support of the ruling below. There the court affirmed an order dismissing a complaint for failure to state a claim against the defendant shipowner in either of two causes of action. The complaint alleged that the plaintiff was injured when he jumped about six feet from the deck of a vessel to the dock. The plaintiff alleged that there was no ladder or other means of egress from the ship, that he requested a member of the crew to place a ladder over the side so that he might go ashore, and that this request was refused. In a per curiam opinion the court said (131 F. 2d 668, 669, 670):

> "Assuming that the failure of the ship to provide a ladder at the time and place indicated was a breach of duty on the part of the owners and therefore, negligence, we are unable to perceive that such negligence bore any causal relation to the injuries of the

plaintiff which followed. The court was right in dismissing the first cause of action." [for negligence]

* * *

"The plaintiff was not compelled to jump from the ship. The only expectable injury that he might have suffered from the failure to provide a ladder would have been some inconvenience or delay in leaving the vessel. This could readily have been avoided or minimized either by putting the ladder in place himself or in requesting someone in authority to direct that it be done. When he leaped from the ship under circumstances where injury might reasonably be expected to result, he acted on his own volition, in the pursuit of his personal affairs, and was not injured in the service of the ship. The court was likewise right in dismissing the second cause of action." [for maintenance and cure]

Appellant's suggestion that it is not for the court to decide a question of proximate causation on a motion to dismiss is plainly incorrect. Where it appears from the allegations of the complaint that the asserted negligence was not the proximate cause of the alleged injury, the proper remedy is a motion to dismiss.

Shelaeff v. Groves (N.D. Cal. 1939) 27 F. Supp. 1018;

Accord, *Hawley v. Alaska S.S. Co.* (9 Cir. 1956) 236 F. 2d 307.

The motion which was granted by the court below challenged the appellant's right to relief on the basis of the facts as stated in the amended complaint. In this connection, the language of Judge St. Sure in *Shelaeff v. Groves,* supra, is pertinent:

"The alleged facts are susceptible of but one inference, and that is that the acts of the defendants or either of them were not the proximate cause of the death of [plaintiff's decedent]. I doubt if it will be possible for plaintiff to amend so as to state a claim against either [of the defendants], and I am of the opinion that the motion should be granted without leave to amend." (27 F. Supp. 1018, 1020)

III.

THE COURT BELOW DID NOT ABUSE ITS DISCRETION IN DISMISSING APPELLANT'S FIRST AMENDED COMPLAINT WITHOUT LEAVE TO AMEND.

Appellant now contends that it was error for the court below to refuse her permission to file a third complaint. But in the court below counsel for the appellant was content to rely on the allegations set forth in the first amended complaint, and offered no additional facts for the proposed new amendment (R. 43, 51). The only suggestion now advanced by appellant is that certain allegations could be added tending to show the basis of an agreement by the shipowner to supply band cutters. At best this is an attempt to enlarge upon a theory of recovery which is defective in its inception. This case does not turn on that issue. There is thus no ground for the proposed amendment.

Gutensohn v. Kansas City Southern Ry. Co. (8 Cir. 1944) 140 F. 2d 950.

Appellant has filed two separate complaints which set forth in great detail the uncontroverted facts of the accident. Her counsel had the opportunity to prepare and

submit to the court below a copy of the proposed new amendment, but this was not done.[9] The difficulty with appellant's position is that all of the pertinent facts are before this Court, and the inferences to be drawn from them are clear.

> "The appellant argues that * * * the libel should be sustained, * * * and that the appellant should be permitted to amend its pleading; but there is no suggestion that other evidence on the merits of the case may be adduced in addition to what is contained in the record. The difficulty which confronts the appellant is not a defect in its pleading, but the nature of the facts which have been disclosed." *W. R. Grace & Co. v. Ford Motor Co. of Canada* (9 Cir. 1922) 278 Fed. 955, 959.

Again in *Suckow Borax Mines Consol. v. Borax Consolidated* (9 Cir. 1950) 185 F. 2d 196, cert. denied (1951) 340 U.S. 943, this Court said on an appeal from an order granting a motion to dismiss a second amended complaint:

> "Appellants did not submit a copy of a proposed third amendment nor suggest to the trial court or to this court the nature or text of the amendment which they desired to make. Nor did they indicate in what respect this amendment would or could overcome appellee's defenses. * * * Under the circumstances of this case we can not find abuse of discretion in the trial court's denial of the motion." (185 F. 2d 196, 209)

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[9]"Common sense dictates the necessity of having before the Court the proposed amendment." *Schwab v. Nathan* (S.D.N.Y. 1948) 8 F.R.D. 227, 228.

It is too late in the day for appellant's proposed amendment. The facts are all before the court and they speak for themselves. It is therefore appropriate to conclude with the observations of Judge Goodman in *Battat v. Home Ins. Co. of New York* (N.D. Cal. 1944) 56 F. Supp. 967, 969:

> "Inasmuch as it is clear that libelant cannot state a cause of action in either count without trifling with the facts, the exceptions to both counts should be sustained without leave to amend."

CONCLUSION.

For the reasons stated, the order of the court below dismissing the first amended complaint without leave to amend should be affirmed.

Dated, San Francisco, California,
February 6, 1958.

Respectfully submitted,
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